Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIANNE STANLEY

Petitioner,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA
and
MICHAEL GARRETT

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 14, 1999

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QUESTIONS PRESENTED

1. Whether Stanley was Deprived of her Seventh Amendment Right to Jury Trial by the District Court Granting Summary Judgment in favor of Defendants when there were genuinely disputed issues of material fact in the record?

2. Whether the District Court Improperly Weighed the Evidence and Gave Lesser Weight To Stanley's Work and Credibility, as a Woman, and Greater Weight to Garrett's Credibility and Raveling's Work, as Men, in Resolving the Factual Disputes Involving Stanley, USC and Garrett?

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PETITION FOR WRIT OF CERTIORARI

The petitioner Marianne Stanley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 16, 1999.

OPINIONS BELOW

The Order and opinion of the Court of Appeals for the Ninth Circuit is unpublished and appears in Appendix E hereto. The opinion of the United States District Court for the Central District of California appears at Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 2, 1999. A timely petition for rehearing was denied on July 16, 1999, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Seventh Amendment preserving "the right of trial by jury" and the Due Process and Equal Protection

provisions of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On or about March 10, 1995, the District Court granted USC's and Garrett's motion for summary judgment in its entirety.

STATEMENT OF THE FACTS

Marianne Stanley's employment as the Head Women's Basketball Coach at USC commenced in July, 1989. Stanley's initial contract was for a four year period (July 1989 to June 1993) at a base salary of $60,000 a year. Stanley's second contract with USC was reached on April 20, 1993 with Garrett and USC. The essential terms of this second multi-year agreement was for a salary equal to the salary paid to Coach Raveling. Garrett reneged on the essential terms of the

April 20, 1993 multi-year contract in a meeting with Stanley on May 27, 1993.

Stanley turned USC's losing women's basketball program into a winning program with repeated trips to the NCAA tournament. Stanley recruited many of the nation's top women student athletes to USC, one of whom became the Player of the Year in 1994. Stanley is recognized as one of the best women basketball coaches in the country.

Both the women's and men's head basketball coaches have the same duties and responsibilities. The duties of the women's and men's basketball head coaches are performed under similar working conditions. Based solely on the sex of the coaches and student athletes, USC discriminates in the compensation, support, marketing and promotion of the women's basketball team.

During Stanley's 17 years as a Head Women's Basketball Coach, she has won four national women's basketball championships. Raveling as a Head Coach for Men's Basketball at USC had not won any national championship as a head coach.

Stanley has won practically every honor or award that can be given to a player or a head coach, including National Championships. Stanley's qualifications and experience were equal, if not superior, to that of the head men's basketball coach.

The University of Southern California paid Stanley less than the head men's basketball coach for equal work as head coach, which required equal skill, effort, and responsibility, and was performed under similar working conditions. During the time Stanley and Raveling were employed with USC, there were no merit or

seniority systems justifying paying Stanley a lower salary than Raveling. Also, there was no system at USC that measured earnings by quantity or quality of production.

The Dispute

Stanley initiated discussions with the Athletic Director, Mike Garrett concerning a new contract with USC in early April, 1993. She specifically indicated to Garrett that she was entitled to be paid equally with the head men's basketball coach, George Raveling, and that she was seeking a contract equal to the one that USC had paid the head men's basketball coach.

In a meeting on April 20, 1993, Garrett and Stanley agreed upon a multi-year contract and Garrett told Stanley that he agreed with her that she should be making what Raveling made and that he

agreed with her position fully and that he would be presenting her with a new contract document shortly that would memorialize their agreement.

Based on her April 20, 1993 agreement with Garrett, Stanley expected a written contract document from Garrett that would be equal to Raveling's salary.

However, by memorandum dated April 27, 1993, Garrett reduced to writing salary figures that did not reflect the April 20, 1993 meeting. Stanley and Garrett were unable to meet again until May 27, 1993, at which time, Stanley stated to Garrett that they agreed to a multi-year contract. Stanley also told him that their agreement was that she was to make the same salary as was paid to the Head Men's Basketball Coach at USC. Garrett indicated to Stanley that he had checked around the conference and that her

new contract would make her the second highest paid women's coach in the PAC-10 Conference. Stanley disagreed with Garrett because that was not their April 20, 1995 agreement. Stanley informed Garrett that she wanted the equal pay for the equal work that she was performing for USC. After Stanley insisted that she was entitled to be paid equal to the Head Men's Basketball Coach at USC, Garrett's attitude toward her changed and he became hostile and abusive toward her. Garrett conducted himself in the Athletic Department as a "dictator". He told Stanley that she was not going to get what USC was paying George Raveling and that she should be satisfied with being the second highest paid women's basketball coach in the PAC-10 Conference. When Stanley told Mr. Garrett that she wanted to be compared to the Head Men's

Basketball Coach at USC and not other women coaches that did not work with USC, he indicated to her that he was not going to change the contract salary terms.

Garrett lied under oath that there never was a May 27, 1993 meeting with Stanley.

When USC and Garrett attempted to terminate her employment because she demanded equal pay, the current litigation ensued.

REASONS FOR GRANTING THE WRIT

At the core of this case is Stanley's constitutional right to a trial by jury that was twice usurped below: first, by the District Court improperly weighing the evidence of disputed facts, including making credibility determinations, granting a summary judgment based on evidence which a jury could have found in Stanley's favor; and second, by the

majority in the Ninth Circuit substituting their judgment, over the objections of the dissent, on disputed facts and credibility issues, for that of jurors in a jury trial. To see beyond the athletic context in which this case arose, one can witness the interaction of gender and law and the powerlessness of a woman to get her day in court because of the reluctance of federal courts to look at expert testimony in discrimination cases and the general tendency of district Court judges to ignore testimony that they believe to be unnecessary to the case.[1] This case also highlights the gradual and continuing erosion of the jury's constitutional factfinder role in federal employment discrimination cases and its replacement

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[1]See, The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, p.131 (July 1993).

by an increasing use of summary judgment by judges substituting their judgment on disputed facts and issues of credibility that were formerly reserved for a jury. Cf. McGinley, Credulous Courts and the Tortured Trilogy, 34 BC L. Rev at 206. For Stanley, as a woman seeking her day in federal court, the lower federal courts handling of the disputed facts and credibility issues was a "tragedy".Cf.Id at 204.

I. Stanley was Deprived of her Seventh Amendment Right to Jury Trial

By improperly focusing on the relative qualifications and experience of Stanley and Raveling, rather than the question of sex discrimination against USC's women's basketball program and Stanley as its Coach, the majority erred by holding that (1) Stanley's three contractual equal pay employment claims

fail for the following reasons (a) express equal pay contract fails because of "no meeting of the minds", despite the parties agreeing that she was entitled to equal pay with Raveling, (b) implied-in-fact equal pay contract fails because it was not in writing and signed by the parties, even though the equal pay term was implied by operation of law into her employment contract, as well as was an express term of her existing contract with USC; and (c) implied covenant of good faith and fair dealing fails because Stanley had no valid contract based on the April 20, 1993 meeting, despite the fact that Stanley had an existing valid contract and a valid and enforceable promise of a new equal pay contract; (2) Stanley's Equal Pay Act claim fails because Stanley "failed to raise a genuine issue of fact as to the University's non-discriminatory reason for

paying Raveling a higher salary", despite the fundamental equal pay principle that "pay discrimination cannot be justified if the differences relied on by the employer in its defense for paying unequal wages for equal work is itself based on discrimination in the terms and conditions of employment; (3) Stanley's FEHA, Title IX and California Constitution claims fail because "Stanley fails to show any discriminatory conduct on the part of USC and Garrett, despite record evidence showing that USC was treating its women's basketball program in such a discrimatory manner based on sex that it made its women student basketball players feel "inferior" to the men student basketball players; (4) Stanley's retaliation claim fails because "USC did not "discharge" Stanley in response to any of her arguably protected activity",despite the fact that Garrett

"discharge Stanley as head coach of women's basketball at USC because she would not negotiate away her right to equal pay, and (5) Stanley's Tameny claim fails because "Stanley failed to present evidence that she was "terminated" from her coaching position after her complaints, despite the fact that Stanley continued to successfully perform her duties while insisting on her right to equal pay for equal work until USC terminated her and replaced her with another head coach who was willing to accept unequal pay for equal work. Stanley v. USC, et al. Appendix E, 69-72.

This case presents an opportunity for this court to resolve a conflict created by the majority that substantially affects an equal pay rule of national application. Because of the important federal policies involved, there is an overriding need for

federal judicial guidance and uniformity in the application of summary judgment to employment discrimination cases. Instead of addressing this difficult question of employment discrimination as presented or remanding to the district court for trial as suggested by the dissent, the majority sidestepped the sex discrimination issue and returned to a discussion of the prima facie aspect of relative qualifications and experience of the male and female head coaches of basketball at USC as a "factor other than sex."

The majority opinion, if allowed to stand, will impair the integrity and scheme of federal anti-discrimination policies and laws prohibiting sex discrimination in the payment of wages to members of the opposite sex for equal work. Furthermore, the majority opinion contravenes the well-settled principle of

statutory construction of a broadly remedial statute, such as the Equal Pay Act, requiring that the Act "be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." Corning Glass Works v. Brennan, 417 U.S. at 208 and Hein v. Oregon College of Education, 718 F.2d at 913. Finally, the majority opinion by declining to focus on the sex discrimination issues raised by Stanley's specific evidence showing pretext for discrimination, and by failing to remand to the District Court for trial, has deprived Stanley of her right of a trial by jury. The majority opinion erroneously focused on Stanley's and Raveling's qualifications and experience rather than the issue of sex discrimination apparently in the mistaken belief that it could sidestep the central discrimination issue

and instead decide the case on summary judgment and the prima facie stage issue of qualifications for the positions of basketball head coach at USC. A similar mistake was reviewed and corrected by this Court in U.S. Postal Service v. Aikens, 460 U.S. at 71 (1983). Judge Pregerson in his succinct dissent pointed the majority to the error of its focus and suggested that the better course in deciding the case was to return it to the District Court for a trial.[2]

A. The Lower Courts' Decisions Denigrate The Role Of The Jury

The majority invaded the jury's fact-finding function on the disputed equal pay factual issues. It was also erroneous for the majority to use the equal pay catch-all defense of a "factor other than sex"

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[2]Appendix E at 75.

rather than a "merit system" as required by the Equal Pay Act in resolving the factual disputes as to the relative qualifications and experience of Stanley and Raveling.[3] See, Brock v. Georgia Southwestern College, 765 F.2d 1026, 1036 (1985) ("This is a question of fact..."). See, Hein v. Oregon College of Education, 718 F.2d at 913 (the Equal Pay Act is "broadly remedial") and Brock v. Georgia Southwestern College, 765 F.2d at 1036) (that exceptions to the Equal Pay Act "if not strictly construed against the employer, could swallow the rule").

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[3]The majority gave greater weight to Raveling's so-called "far greater experience as a coach and marketer than Stanley." This was a pretext not relied upon by USC in setting Raveling salary. For example, during Raveling's employment at USC, he was paid additional money annually for a summer camp that he never conducted. USC would not allow Stanley a summer basketball camp. In the context of the EPA this payment to Raveling sheds much light on the use of Raveling's qualifications and experience as a pretext for sex discrimination. See, Hein at 914. See also, Payne v. Norwest Corporation, 113 F.3d at 1080, citing Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996).

The majority's application of the Equal Pay Act to the factual disputes in this case is contrary to substantive decisional law of the Ninth Circuit,[4] and the law concerning summary judgment as set forth by this Court in its trilogy of summary judgment cases namely, Matsushita Electric Industrial Co. v. Zenith Radio Corp. 475 U.S. 574(1986); Anderson v. Liberty Lobby, 477 U.S.242(1986); and Celotex v. Catrett,477 U.S.317(1986). Here, the majority has improperly compared the qualifications and experience of Stanley and Raveling, improperly determined material credibility disputes and drew improper inferences from the disputed evidence. In other words, the

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[4]See, Hein v. Oregon College of Education, 718 F.2d at 914. ("The only comparison of skills that should be made in a prima facie case is a comparison of skills required by the job").

majority has committed error by not remanding the case for resolution of these disputed issues by a jury. Weighing the qualifications and experience of Stanley and Raveling were jury functions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255(1986). Accord, Payne v. Norwest Corporation, 113 F.3d 1079, 1080 (9th Cir.1997). See also, McGinley, Credulous Courts and the Tortured Triology: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 BC L. Rev. 203, 206 (1993).

The majority has erroneously affirmed the District Court's denigration of the fact-finding role of the jury. This case is too important for resolution by an improper trial by affidavits. Judge Pregerson's dissent cogently and succinctly identified the judicial error

of the majority[5]. In Hein, the Court found that the standard for evaluating fact finding, i.e., the clearly erroneous standard, was applicable to the "question of whether two jobs are substantially equal". Hein at 913. The comparison of the two jobs is factual and is done on a case by case basis. Id. Stanley has produced specific, substantial evidence of pretext. Thus, the determination of whether USC has proved that the differential in wages paid to Stanley and Raveling was justified under the "factor other than sex" exception to the Equal Pay Act or merely a pretext for unlawful discrimination was a jury question. Id.

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[5]Judge Pergerson's position on a need for a trial is consistent with the earlier decision of another panel of Court in Stanley v. University of Southern California, et al., 13 F.3d 1313 (9th Cir. 1994)("Stanley I")(Judges Alarcon, Leavy and Kleinfeld)("We obviously cannot evaluate the persuasive impact of the evidence that the parties may bring forth at trial.").

B. The District Court Improperly Weighed the Evidence and Gave Lesser Weight To Stanley's Work and Credibility, as a Woman, and Greater Weight to Garrett's Credibility and Raveling's Work, as Men, in Resolving the Factual Disputes Involving Stanley, USC and Garrett?

This case personifies the significant impact that gender plays on women litigants and witnesses proceeding in federal court on civil rights claims. In Stanley's contract and salary disputes with her employer, Stanley's testimony was simply disbelieved or discounted by the lower federal courts even when it was demonstrated that the men were lying under oath.[6]

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[6]See, The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, p. 197("One problem is that of credibility of witnesses....Women's testimony may simply be disbelieved or discounted as complaints about life rather than as providing evidence of legally cognizable harm. A second concern is that, under some legal rules, even

1. Equal Pay Contract Discussions on April 20 and May 27, 1993

The Majority's fact-finding concerning the April 20, 1993 meeting between Stanley and Garrett crossed the delicate line between issue identification and issue resolution.[7] Stanley's right to fact finding by a jury was impaired by the majority's improper judicial assessment of credibility, weighing and drawing

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when women's injuries are not disbelieved, they still may be trivialized, considered minor irritations to be borne rather than the stuff of legal rights. A third difficulty is that the very fact that women perform the tasks and obligations typical of most women's lives may serve to make their legal claims less credible." See also, McGinley, Credulous Courts and the Tortured Trilogy, 34 BC L.Rev. at 256("Courts can reconcile the trilogy with the McDonnell Douglas/Burdine formula. Courts must avoid automatically crediting defendants' reasons, drawing inferences in defendants' favor, deciding witnesses' credibility on paper and requiring plaintiffs to prove their cases at the summary judgment stage."

[7]See generally, McGinley, Credulous Courts and the Tortured Trilogy: The mproper Use of Summary Judgment in Title VII and ADEA Cases, *34 Bc L. Rev 203(1993).*

inferences from disputed evidence. Stanley and Garrett held equal pay discussion concerning a new contract on April 20, 1993. Viewing the facts most favorably to the non-movant, Stanley and Garrett, as Athletic Director for USC, reached an agreement for equal pay on April 20, 1993. While noting that "[t]he parties disagree over what took place at this meeting", the Majority erroneously and improperly resolved this important credibility issue in favor of Garrett. Appendix E at 60. Stanley has never had her day in Court on these disputed factual issues. The majority fact-finding on these two dates is clearly erroneous. The majority overlooked that Stanley's equal pay contract discussions were protected by federal law and policies. The Equal Pay Act and Title IX were terms and conditions of Stanley's employment with

USC by operation of law. In fact, these Acts were terms of her USC employment both by statute and contract as set forth in the USC's staff handbook.

All of Stanley's efforts in attempting to get USC and Garrett to honor the April 20, 1993 equal pay agreement were protected activities. Unfortunately, all of USC's and Garrett's efforts after the April 20, 1993 and May 27, 1993 meetings were unlawfully designed to get Stanley to negotiate away her contractual and statutory rights to equal pay.[8] Rather than honor the April 20, 1993 equal pay agreement, Garrett and USC terminated

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[8]USC and Garrett cannot require Stanley as a term and condition of her employment to negotiate away her statutory rights to equal pay. See, Laffey v. Northwest Airline, Inc., 567 F.2d 429, 447 (D.C.Cir. 1977). Stanley's statutory equal pay claim inured as of April 20, 1993. The Equal Pay Act requires that "employees doing equal work should be paid equal wages regardless of sex." Hein v. Oregon College of Education, 718 F.2d at 913. Thus, as of April 20, 993, Stanley had made out a case under the Equal Pay Act. Id. The "unraveling" of this material factual dispute is the function of a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. Accord, Payne v. Norwest Corporation, 113 F.3d at 1080.

Stanley for insisting on her rights to equal pay. However, the resolution of the termination issue is a jury question. Payne v. Norwest Corporation, 113 F.3d at 1080.

2. Garrett's Lack of Credibility[9]

The Majority and the District Court have unfairly credited Garrett in this equal pay dispute even though Stanley has demonstrated that Garrett, as Athletic Director, at USC, has reneged on the April 20, 1993 equal pay agreement and lied under oath that there was never a May 27, 1993 meeting with Stanley. Garrett's lack of credibility on these material issues in dispute rendered him unworthy of credence by the majority; especially in the light

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[9]It was improper for the District Court as well as the Court of Appeals to credit the testimony of Garrett over Stanley. This function should have been reserved for the jury. See generally, McGinley, Credulous Courts, etc., 34 BC L.Rev. at 240n.309.

of Stanley's specific and substantial showing that Garrett acts on sexist view of the marketplace.[10] Garrett has also misrepresented Raveling's qualifications and experience as a pretext for discrimination. It was improper for the majority to accept Garrett's affidavit as gospel truth while not giving Stanley a full and fair opportunity to demonstrate pretext for sex discrimination.[11] Stanley

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[10]See Section III(3) infra . See, Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989) and Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir.1991).

[11]The majority went astray on the job equivalence issue because of its improper crediting of Garrett's biased affidavit and its improper focus on the number of years that Raveling has been a coach and his so-called marketing experience outside of coaching. This was all pretext not relied upon in setting Raveling's salary. However, even if we were to assume that Raveling had longer or greater coaching experience which may serve as a valid reason for paying him a higher salary based on a "merit system" at USC, it does not compel the conclusion that his job was not substantially equal to Stanley during the period in question. See, Hein, 718 F.2d at 919. It was improper for the Panel to assume that Raveling's so-call qualifications and experience were superior to Stanley under the defense of a "factor other than sex" when Stanley submitted sworn affidavits and deposition evidence from herself as well as expert witnesses refuting USC's pretext and supporting the existence of discrimination against

has pointed to sufficient facts calling into question the credibility of Garrett's and USC's nondiscriminatory explanations. A reasonable jury could find that Stanley was discriminated against because of her sex. Lindahl v. Air France, 930 F.2d at 1439). The majority has not viewed the disputed facts in the light most favorable to Stanley.[12]

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her which were the central facts in dispute and which were to be taken as true for purposes of deciding the motion for summary judgment. McLaughlin v. Liu, 849 F.2d 1205,1208 ((9th Cir. 1988). The majority overlooked the lack of a "merit system" at USC that would fairly reward members of both sex based on merit. And, the Panel's holding on the "factor other than sex" as broadly and loosely construed against Stanley swallows the whole Equal Pay Act and, in effect, renders its a nullity. Cf.Brock v.Georgia Southwestern College, 765 F.2d 1026, 1036 (11th Cir. 1985).

[12]It is a question of fact for a jury as to (1) whether Raveling experience as an Assistant (Asst Head) Olympic Coach is a superior qualification or experience to the four national basketball championship teams that Stanley has coached as a Head Coach, as well as, playing in several Final Four championship tournaments and being an All-American player in college.(ER at 200); (2) whether the so-called books written by Raveling shows superior qualifications to the book written about Stanley as being one of the Greatest Coaches in America, having been national coach of the year twice, Virginia Coach of the Year four times, PAC-10 Coach of the Year and being inducted as a charter member into the Women's Basketball Hall of

CONCLUSION

For these foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Fame. See Hull v. Cuyahoga Valley Bd. Of Educ., 926 F.2d 505, 514 (6th Cir. 1991) (summary judgment reversed because district court made credibility determination and drew inferences in defendant's favor); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1423 (3rd Cir. 1991) (on review, court properly inferred employer discharged plaintiff in retaliation, because plaintiff declined to accept early retirement and had consistently received good to outstanding reviews since 1942); Johnson v. Minnesota Hist.Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991) (summary judgment reversed because lower court resolved conflicting evidence as to whether plaintiff's job continued to exist); Taggart v. Time Inc., 924 F.2d 43, 48 (2d Cir. 1991) (court properly inferred that defendant's reason not to hire plaintiff, overqualification, raised inference of age discrimination.

Respectfully submitted,

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APPENDICES

APPENDIX A

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MAR 8 1995

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARIANNE STANLEY, Plaintiff V. THE UNIVERSITY OF SOURTHEN CALIFORNIA; MICHAEL L. GARRETT, Individually and In Capacity As Athletic Dirctor; AND DOES 1 THROUGH 20, INCLUSIVE, Defendants.	) CASE NO. CV 93-4708 JGD))) JUDGMENT))))) THIS CONSTITUTES) NOTICE OF ENTRY) AS REQUIRED BY FRCP,) RULE 77(d).

The evidence and issues presented having been fully considered, and a decision having been duly rendered, the Court hereby ORDERS that judgment be entered for Defendants the University of Southern California and Michael L. Garrett, and against Plaintiff Marianne Stanley, in the action herein.

IT IS SO ORDERED.

Dated: MAR 8 1995

[signed]
JOHN G. DAVIES
United States District Judge

APPENDIX B

ENTERED _____NO JS-6

FILED
MAR 8 1995

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARIANNE STANLEY, Plaintiff V. THE UNIVERSITY OF SOURTHEN CALIFORNIA; MICHAEL L. GARRETT, Individually and In Capacity As Athletic Dirctor; AND DOES 1 THROUGH 20, INCLUSIVE, Defendants.	) CASE NO. CV 93-4708 JGD))) ORDER GRANTING) DEFENDANTS' MOTION) FOR SUMMARY) JUDGMENT)) THIS CONSTITUTES) NOTICE OF ENTRY) AS REQUIRED BY FRCP,) RULE 77(d).

On December 12, 1994, Defendants' Motion for Summary Judgment came on before the Court for hearing. Counsel for Plaintiff asserted further discovery was necessary to fully present her opposition to the motion. The Court granted Plaintiff leave to conduct further discovery and file additional written points and authorities and argument. Said supplemental materials were listed on December 27, 1994. The Defendants filed a response on January 4, 1995. The Court has reviewed the additional papers and declarations

filed by the Plaintiff, and the Defendants' response thereto. Having considered all written submissions of the parties, and the oral argument of counsel, the Court hereby GRANTS the motion.

I.
Procedure History

On August 5, 1993, Plaintiff Marianne Stanley filed a complaint in Superior Court for the County of Los Angeles. Stanley was the head coach of the women's basketball team at the University of Southern California. The complaint alleged claims of sex discrimination and retaliatory discharge. The defendants were the University of Southern California ("USC"), and the USC Athletic Director Michael L. Garrett.

On August 6, 1993, Judge Robert H. O'Brien granted Stanley's Request for a Temporary Restraining Order. USC was required to reinstate Stanley to the position of head coach of the women's team. On the same date, the Defendants removed the action to this court, on the grounds the complaint alleged federal civil rights claims. On August 26, 1993, the Court heard Stanley's motion for a preliminary injunction. The Court denied the motion in an order dated

August 30, 1993. The Ninth Circuit affirmed in an opinion filed January 6, 1994, Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994).

On September 9, 1993, Stanley filed an Amended Complaint. On September 23, 1993, the Defendants moved to dismiss pursuant to Fed. R. Civ. P 12(b)(6). On November 10, 1993, the Court granted the motion in part. The seventh and eighth causes of action, for intentional infliction of emotional distress and conspiracy, were dismissed without leave to amend on the grounds that such tort claims are not cognizable in the employment discharge context under California law. The second (Article I, Section 8 of the California Constitution), fourth (retaliation), sixth (breach of an implied-in-fact contract), ninth (breach of an express contract), and tenth (breach of the implied covenant of good faith) causes of action were dismissed with leave to amend on the grounds that they were substantially ambiguous. The first (Equal Pay Act and FEHA), third (Title IX) and fifth (wrongful discharge) causes of action were not addressed in the motion.

Stanley filed a Second Amended Complaint on December 6,

1993. On December 20, 1993, Defendants moved to dismiss and strike portions of the Second Amended Complaint. On January 19, 1994, Plaintiff filed a motion to amend pursuant to Fed. R. Civ. P. 15(a). On February 4, 1994, the Court granted Plaintiff's motion to amend, denied Defendants' motion to strike, and granted in part Defendants' motion to dismiss. The Court dismissed the eight cause of action (breach of implied covenant of fair dealing) with leave to amend. As to Defendant Garrett, the Court ordered dismissal of the second cause of action (Article I, Section 8 of the California Constitution) without prejudice because Stanley had not alleged that Garrett was her employer. The fourth cause of action (retaliation) was dismissed with prejudice as to Garrett only.

On February 23, 1994, Stanley filed a Third Amended Complaint (the "complaint"). It alleges the following causes of action: (1) Employment Discrimination in violation of the Equal Pay Act, 29 U.S.C. Section 206(d)(1), and the California Fair Employment and Housing Act ("FEHA"), (2) Employment Discrimination in violation of Article I, Section 8 of the California Constitution; (3) Employment Discrimination in violation of Title IX

of the Civil Rights Act of 1972, 20 U.S.C. Section 1681; (4) Retaliation; (5) wrongful discharge in violation of public policy; (6) breach of implied-in-fact employment contract; (7) breach of express contract; and (8) breach of the implied covenant of good faith and fair dealing.

Stanley requests the Court to declare that USC's and Garrett's conduct was in violation of the public policies and laws, and seeks a permanent injunction restraining the Defendants from discrimination and retaliation. Stanley further seeks an order reinstating her to the position of head coach of the women's basketball team or a comparable position, back pay, three million dollars in compensatory damages, and five million dollars in punitive damages.

On October 17, 1994, Defendants filed the instant motion for summary judgment. The motion was continued to December 12, 1994 because plaintiff asserted the motion had not been properly served and because further discovery was necessary. On December 9, 1994, the Court denied Plaintiff's ex parte application to continue the motion. Plaintiff filed no substantive opposition to the motion. The Court heard oral argument on December 12, 1994. Plaintiffs represented to

the Court that further discovery was necessary. The Court deferred ruling on the motion and granted Plaintiff leave to conduct further discovery and file supplemental briefs. Thereafter the motion was submitted without further oral argument.

II.
Facts

Plaintiff Marianne Stanley was hired as the head coach of the USC women's basketball team in the summer of 1989. On July 30, 1989, Stanley signed a four-year contract with USC. The contract expired June 30, 1993. Prior to being hired, Stanley initiated contact with USC and actively pursued the women's head coach position. The employment contract provided that USC would pay Stanley an annual base salary of $60,000 a year. The base salary was increased to $62,000 a year in 1992.

The parties have not described Stanley's performance as head coach of the women's basketball team. It appears, however, that the women's basketball team was very successful during Stanley's tenure. She recruited to USC several of the nation's outstanding high school players. Stanley is recognized as an outstanding teacher or the

technical skills of basketball. There is no evidence that USC was in any way dissatisfied with Stanley's performance.

Defendant Michael Garrett is the USC Athletic Director. In or about April, 1993, Garrett and Stanley commenced the negotiation of a new employment contract. Because the summer months are a critical time for recruiting student athletes, and because the basketball team commences practice shortly after students arrive for the Fall semester, Garrett considered it necessary to conclude the contract negotiations prior to June 30, 1993, the expiration date of Stanley's first employment contract.

On April 20, 1993 Garrett and Stanley met for the first time to negotiate renewal of the contract. Stanley demanded compensation equal to the amount paid to George Raveling, the head coach of the USC men's basketball team. Garrett informed Stanley that USC would not pay her such a high salary. He stated he would present a formal offer in writing. On April 27, 1993, Garrett offered Stanley a three-year contract that would increase he rcompensation from $69,933, her salary for the previous year, to $86,000 for the first year of the contract. He offered compensation increases from $86,000 to

$96,000 in year two, and from $96,000 to $106,000 in year three.[1] The proposal was confirmed in writing. See Garrett Memorandum, Exh. 102 to Stanley Depo. Vol. I. Garrett informed Stanley that he needed a response within "a couple of days." Stanley characterized Garrett's proposal as "an insult."

On May 27, 1993, Stanley and Garrett met at Stanley's request to further discuss the offers made by Garrett on April 27, 1993. Stanley rejected the three year contract because it did not provide for compensation equal to that paid to Raveling. Stanley Dep., Vol I at 83. When Stanley inquired why she was not offered compensation equal to that paid to the men's coach, Garrett stated that the terms of the offer were based on her performance as women's head coach. Stanley Depo., Vol. I at 80.

On or about June 7, 1993, Garrett and Stanley again met and continued negotiations. Garrett offered a three-year contract with the same compensation as was offered on April 27, 1993. Stanley proposed a three-year contract that provided for compensation of

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[1]Each year's proposed salary included a $6,000 housing allowance.

$96,000 per year for the first 18 months, and an increase in total compensation to the amount paid to Raveling over the final 18 months. Garrett rejected Stanley's counteroffer.

Stanley retained an attorney, Timothy Stoner, to represent her in subsequent contract negotiations. On June 18, 1993, Stoner spoke to Garrett by telephone. Stoner stated that Stanley was seeking a three-year contract with an automatic two-year renewal provision, and total compensation of $88,000 in year one, $97,000 in year two, and $112,000 in year three. Stanley also sought additional "incentives," including free room and board for her daughter if she attended USC as an undergraduate student, radio and television shows featuring Stanley and the USC women's basketball team, and bonuses if the team won the conference championship or NCAA playoff victories, and Stanley received "coach of the year" honors. Stoner informed Garrett that Stanley was willing to accept a higher guaranteed salary and fewer incentives.

Garrett rejected the proposal presented by Stoner and withdrew the offer made on April 27, 1993. Garrett informed Stoner that he would present a final offer on June 22, 1993.

On June 21, 1993, Garrett transmitted to Stoner via facsimile a written offer for a one-year contract. USC offered Stanley compensation of $96,000, and participation in USC's employee benefit program. Garrett informed Stoner that this was USC's final offer. Garrett asserted that the proposed contract, if accepted by Stanley, would have made her the second highest paid women's basketball coach in the Pacific Ten Conference and one of the highest paid women's coaches in the nation.

On July 13, 1993, Stanely spoke to Garrett by telephone. She inquired whether USC would till offer a multi-year contract. Garrett reiterated that a one-year contract with compensation set at $96,000 was USC's final offer. Because the summer was nearly half over, Garrett stated that he needed Stanley's final decision by the end of the day.

Stanley did not respond to the "final offer" by the end of the day on July 13. On July 14, 1993, Stanley sent a memorandum to Garrett requesting additional time to consider the offer. She was upset Garrett had withdrawn the offer of a multi-year contract. On July 15, 1993, Garrett informed Stanley by written memorandum that

the one-year offer was revoked because Stanley had failed to accept it before the deadline. Garrett stated he was willing to listen to any proposal Stanley might have. However, at that time USC had no contract offers to Stanley "on the table." Garrett further staed that "for the protection of the program," he was beginning to actively look for new candidates to fill the women's head coach position. Garrett informed Stanley that her contract had expired on June 30, 1993, and asked her to perform no further services for the University unless and until she entered into a new contract.

Stanley and Garrett conducted no further negotiations. On August 3, 1993, Stanley's present attorney, Robert L. Bell, sent a letter via facsimile to USC's Acting General Counsel. Mr. Bell stated he had been retained to represent Stanley, and that he desired to find an amicable solution to the dispute between Stanley and USC. Bell stated that if USC did not respond by August 4, 1993, he would "seek recourse in court." On August 4, 1993, USC's Acting General Counsel sent a letter to Bell via facsimile in which he stated he would consider proposals for an "informal resolution" to the dispute between

Stanley and USC. On August 5, 1993, Stanley filed her complaint in Los Angeles Superior Court.

III.
Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court clarified the standard for summary judgment in three important cases. See Celotex Corporation v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 47 U.S. 242 (1986); Matsushita Electrical Industry Co. v Zenith Radio Corp., 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Anderson, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; a fact is material if it may affect the outcome of the suit. Id. At 248. If the moving party seeks summary

adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must e satisfied by affirmative admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. See Celotex, 477 U.S. at 325; see also Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial §§ 14:123-141 (1994).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). Summary Judgment will be entered against the non-moving party, when appropriate, if that party does not present these specific facts. Id.

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable

inferences are to be drawn in its favor. Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient. Id. At 252. As the Court explained in Matsushita, 475 U.S. at 586-87:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

However, an alleged "genuine issue" will not defeat summary judgment where the factual context makes the non-movant's allegations implausible. See California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 848 U.S. 1006 (1988). Consequently, where the factual context makes the non-movant's claim implausible, the non-movant "must come forward with more persuasive evidence to support their claim than would otherwise be necessary" to show that

there is a genuine issue for trial. Id.

IV.
Discussion

A. Discrimination Claims

The first three causes of action allege gender discrimination in violation of State and Federal Statutes and the California Constitution. The first cause of action arises under the Equal Pay Act, 29 U.S.C. § 206(d)(1), and FEHA, Cal. Govt. Code § 12940 et seq. Stanley asserts that USC maintained a policy or practice of paying women disparate wages and benefits as compared to male employees who perform equal work. Complaint[2], ¶ 9. During the four years Stanley was the head coach of the women's basketball team, she was compensated less than the head coach of the men's basketball team even though the jobs required equal skill and effort. Complaint, ¶ 13.

The second cause of action is for employment discrimination in violation of Article I, Section 8 of the California Constitution.

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[2]All references are to the Third Amended Complaint, filed February 23, 1994.

Stanley asserts that USC denied her the benefits of a multi-year contract with terms equal to those provided to the men's basketball coach because she is a woman. Complaint, paras. 30-31. The alleged discrimination by USC and Garrett was in reckless disregard for Stanley's rights because the Defendants knew she was entitled to compensation equal to that paid to Coach Raveling. Complaint, ¶ 36.

The third cause of action arises under Title IX of the Civil Rights Act of 1972, 20 U.S.C. § 1681. The allegations are essentially the same as those in the first two causes of action. Coach Stanley was denied compensation equal to that paid to the men's head coach because of gender discrimination by USC. Complaint, ¶ 53. The third cause of action, like the second, is against USC and Garrett.

1. Applicable Standards

> The Equal Pay Act ("EPA") provides in relevant part:
>
> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill effort, and responsibility, and

> which are performed under similar working conditions.

29 U.S.C. § 206(d)(1). To state a claim under this section, the plaintiff's job must require substantially the same skill, effort, and responsibility as the higher compensated job held by a member of the opposite sex. Forsberg v. Pacific Northwest Bell Tel., 840 F.2d 1409, 1414 (9th Cir. 1988). The Plaintiff must prove that the employer is paying different wages to employees of the opposite sex for equal work. Hein v. Oregon College of Education, 718 F.2d 910 (9th Cir. 1983).

The Fair Employment and Housing Act prohibits an employer from discriminating against any person "because of [their] race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex." Cal. Govt. Code § 12940(a). This of course includes cases of disparate compensation. To establish a claim under this section, the employee has the burden of proving wrongful discrimination by the employer. If the plaintiff does so, the burden shifts to the employer to show a lawful reason for its action. Gonzales v. Metpath, Inc., 214 Cal.App.3d 422, 426, 262

Cal. Rptr. 654, 657 (1989).

Article I, Section 8 of the California Constitution provides that "a person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color or national or ethnic origin." Similarly, Title IX of the Civil Rights Act of 1972 prohibits an educational program that receives federal financial assistance from denying benefits to, or subjecting to discrimination, any person on the basis of sex. 20 U.S.C. § 1681(a).

The Court has considered whether the women's head coach position was substantially equal to the men's head coach position, and whether USC discriminated based on gender. The Court finds no discrimination arising from USC's contract offers to Stanley. It thus was not required to pay her a salary equal to that paid to the men's head coach.

2. Absence of Evidence of Sex Discrimination

In its Order Denying Plaintiff's Motion for Preliminary Injunction, the Court concluded the men's and women's basketball head coach positions are not substantially equal. August 26, 1993

Order at 15-17. The Court found the difference were sufficient to deny the motion for Preliminary Injunction. August 26, 1993 Order at 19. The Ninth Circuit affirmed and found Coach Stanley had not proven her responsibilities were the same as those of the men's basketball head coach. Stanley, 13 F.3d at 1323. Eighteen months later, the parties have completed extensive discovery and taken more than thirty depositions. Stanley still is unable to show the existence of a genuine issue of material fact on the issue of whether the men's and women's basketball coaching positions are substantially equal and require equal pay under the law. It is clear they are not.

Both the men's and women's head coaches recruit student athletes, coach basketball, provide academic guidance to team members, and supervise their coaching staffs. The men's coach, however, is under considerable pressure to generate revenue for the university by attracting paying spectators and producing a winning team. Head Coach Raveling was "pressured" by the Athletic Director to increase the number of spectators in order to help alleviate a million-and-a-half dollar deficit in the athletic department. Raveling Depo., Vol. I at 169-70. This could be accomplished by winning a

high percentage of the team's games and participating in the NCAA Tournament. Id. At 169.

The responsibility of generating revenue for the University places more pressure to win on the men's basketball coach than that experienced by the women's coach. Raveling Depo., Vol I at 124. The pressure is created by the media, public, and the school's administration and donors. Id. At 129.

In contrast to the demands placed on the men's head coach, Stanley was not required to attract spectators, produce television or radio revenue, attract attention to the University, or raise revenue. Stanley Depo., Vol. 6 at 989. Stanley testified that she was responsible for raising revenue to defray the cost of the women's basketball program. Id. At 990. But, she did so by soliciting donations and attracting corporate sponsors. The women's basketball program did not raise revenue for other sports programs, and Stanley knew that the revenue produced by the women's basketball team did not cover the cost of operating the program. See id. At 993.

Stanley made herself available for public appearances for promotion of the women's basketball team. She appeared at least one

time on a local cable television station program that focused on USC athletics. Garrett Dec., ¶ 12. But, Stanley was not required to make any specific number of public appearances to promote the women's basketball team. Stanley Depo. Vol. 4 at 728. The University did not impose public relations responsibilities on her while she was head coach. Id. In contrast, Raveling's contract required participation in at least twelve outside speaking engagements per year, that he be accessible to the media for interviews, and that he participate in community activities. He was required to participate in fundraising activities benefitting the athletic department in general and the men's basketball program in particular. Garrett Decl. At ¶ 12.

As compared to the women's basketball program, the USC men's team raised substantial revenue for the athletic department. Revenue generation is an important factor in determining whether responsibilities and working conditions are substantially equal and whether greater compensation is justified. Stanley, 13 F.3d at 1323.

While Stanley was head coach, the USC women's basketball program produced $59,918.50 in total revenue for the University. Lopes Decl. ¶ 12. Said revenue was derived solely from ticket sales.

Id. At ¶ 10. USC has no contracts with radio or cable television companies for the exclusive right to broadcast USC women's basketball games. USC does not share in the revenue when the women's team plays away games. Id. The USC women's basketball program received $11,912 in donations while Stanley was the women's coach, and one endowment that produced $828.26 in annual income. Id. at ¶ 5; Lopes Supp. Decl. at ¶ 6.

During the same period, the USC men's basketball program produced total revenue of $4,621,020.90. Lopes Dec. ¶ 12. The revenue was derived from ticket sales, broadcast right fees, cable television right fees, Pacific Ten conference revenue sharing, guarantees from away games, post season revenue sharing, and endowment income.[3] Id. at ¶ 9. Supporters donated $98,001.50 during this period. Id. at ¶ 5.

The women's basketball team played before 41,917 spectators while Stanley was the head coach. The team averaged 762

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[3]Endowment income was $2,251.65, and does not include gifts to the men's basketball program that were not large enought to create a separate endowment. See Lopes Supp. Decl. At paras. 4, 6.

spectators per game. During the same period, the men's basketball team played before 237,950 spectators, for a per game average of 4,103. Elliot Decl., ¶ 5. A total of 284 season tickets were sold to the public for women's basketball games, an average of 71 per season. A total of 5,101 season tickets were sold for men's basketball games, an average of 1,275 per season. Id. At 10. The price of season tickets to men's basketball games was at all relevant times at least twice the price of season tickets to women's basketball games. Id. At 11.

The Ninth Circuit has stated that a "quantitative dissimilarity in responsibilities justifies a different level of pay for the head coach of the women's basketball team." Stanley, 13 F.3d at 1321. There is without a doubt a quantitative dissimilarity in the respective responsibilities of Stanley and Raveling.

When compared to Stanley, Coach Raveling possessed substantially different and superior qualifications and experience in public relations and revenue-generation. Employers who reward professional experience and education are not guilty of discrimination, and it is proper to consider the marketplace value and the skills of the

particular individual when determining his or her salary. Stanley, 13 F.3d at 1321-22.

Stanley has seventeen years of experience coaching women's basketball. Raveling coached for more than thirty-one years before his recent retirement. Stanley Depo., Vol. 4 at 713. Raveling coached at USC for three seasons prior to Stanley's appointment as the women's coach. Garrett Decl. Paras. 13, 18. Coach Raveling had nine years of marketing and promotional experience outside of coaching. Garrett Decl. ¶ 14. He sat on the boards of three major corporations, wrote two books, and performed up to 150 public speaking engagements per year. Garrett Decl. Paras. 16, 17. Raveling was hired by USC in part because he was considered one of the top basketball recruiters in the nation. Id.

Stanley's marketing experience was limited to promoting the teams she coached. She claims she successfully promoted teams at Old Dominion University and the University of Pennsylvania. Stanley Depo., Vol. 4 at 715. She hno marketing experience unrelated to coaching. Id.

Stanley admits Coach Raveling's public recognition exceeded

her own, Stanley Depo., Vol. 4 at 701, but blames the difference on the media. The media, she claims, devoted greater coverage to Coach Raveling and the men's basketball program due to the "nature of the relationship between sports and media and men and women in sports and their relationship to the media." Id. At 702. USC cannot be held responsible for the media's greater coverage of men's athletics. Stanley, 13 F.3d at 1323. The effect, however, was greater recognition and revenues associated with the men's basketball team. Also, there is more fan interest and support for men's basketball than for women's.

Stanley has failed to demonstrate that the women's and men's head basketball coaches at USC, in the relevant time period, performed substantially the same jobs or possessed the same skills. Nor has she shown that USC is guilty of sex discrimination. The declarations produced by Plaintiff do not prove that the differences in fan support, revenue, and pressures associated with coaching the men's and women's teams are due to discriminatory acts by the Defendants. Accordingly, Defendants USC and Michael Garrett are entitled to summary judgment on the discrimination causes of action.

The Court further notes that Defendant Garrett is entitled to summary judgment on the second and third causes of action because said claims may be brought against employers only. They do not run against individual supervisors. See, Miller v. Maxwell Plum Int'l, Inc., 991 F.2d 583 (9th Cir. 1983). Stanley has produced no evidence that Garrett was her employer. His power as athletic director to hire and fire athletic coaches does not make him an employer for purposes of individual liability under Article I, § 8 or Title IX.

B. Retaliation Claim

The fourth cause of action is for retaliation. It is against USC only. February 4, 1994 Order at 13. Stanley asserts that USC withdrew a multi-year contract offer when she insisted that USC honor a contract which she claims was agreed upon by Garrett on April 20, 1993. Complaint, paras. 57, 59. Stanley further alleges that she was discharged on September 3, 1993 in retaliation for filing a discrimination charge with the Department of Fair Employment and Housing ("DFEH") and filing a complaint in state court. Complaint, ¶ 60.

Section 704(a) of Title VII of the Civil Right Act of 1964, 42

U.S.C. § 2000(e)-3(a) provides that it is unlawful for an employer to discriminate against an employee because the employee opposed any practice made unlawful by Title VII or because she has filed a charge under Title VII. Although the complaint does not state that the retaliation claim arises under Section 704(a), Stanley asserts USC discharged her in retaliation for the "protected activity" of demanding equal pay and filing interpreting Title VII cases should be applied. Opp. At 45. Accordingly, the Court addresses the retaliation claim as if it arises under Title VII.

To establish unlawful retaliation, Stanley must prove that she engaged in protected activity, that she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984). To show the requisite causal link, the plaintiff must present evidence sufficient to raise an inference that the protected activity was the likely reason for the retaliatory action. Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982).

Once the plaintiff makes out a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory

explanation for the action. Miller v. Fairchild Indus., Inc., 797 F.2d 727, 731 (9th Cir. 1986). If the employer successfully rebuts the inference of retaliation, the burden shifts back to the plaintiff to show that the defendant's explanation is merely a pretext for discrimination. Wrighten, 726 F.2d at 1354.

Stanley has not established a prima facie case of unlawful retaliation. She claims that USC rescinded an offer for a multi-year contract when she demanded compensation equal to that paid to the men's head coach. Although the parties dispute whether Garrett ever offered Stanley compensation equal to Coach Raveling's compensation, it sis undisputed that he offered her a multi-year contract on April 27, 1993 Exh. 102 to Stanley Depo. Garrett did not withdraw the multi-year contract offer as a result of demands made by Stanley on April 20, 1993. Stanley testified that an offer of a multi-year contract with a substantial pay increase remained open as late as June 7, 1993. Stanley Depo., Vol I at 318. Stanley and Garrett negotiated the terms of the contract for more than six weeks while USC's multi-year offer remained open. She has not shown that a multi-year contract offer was withdrawn because of demands made

on April 20, 1993.

Stanley was not unlawfully "discharged" by USC when she filed a claim with the DFEH and a complaint against USC in state court. She was no longer employed by USC after June 30, 1993, the date her employment contract expired. Head Coaching Contract–Women's Basketball, Exh. 101 to Stanley Deposition; Stanley Depo., Vol I at 16. Stanley did not accept any of the subsequent offers by USC. Garrett Decl. Paras. 26-34. On May 27, 1993, Stanley rejected the written offer of a three-year contract. Stanley Depo., Vol. I at 83. On July 15, 1993, Garrett withdrew the offer of a one-year contract with an anual salary of $96,000 because Stanley failed to accept the offer by the deadline. Stanley Depo.., Vol 2 at 374-75. Garrett informed Stanley in writing that her employment contract had expired on June 30, 1993, and requested that she perform no further services for USC unless and until the parties entered a new employment contract. Garrett Memorandum, July 15, 1993; Exh. 122 to Stanley Depo.

The Court finds Stanley was not discharged in retaliation for filing the claim or the lawsuit. Stanley's employment contract expired

June 30, 1993, and she failed or refused to agree to the offered terms that would have formed the basis of a new contract. The evidence does not show that USC's refusal to renew the contract resulted from Stanley's engaging in protected employment activity. See Wrighten, 726 F.2d at 1354. USC is entitled to summary judgment on the retaliation claim.

C. Wrongful Discharge in Violation of Public Policy

The fifth cause of action is for wrongful discharge in violation of public policy. It is against USC and Garrett. Stanley alleges that the Defendants violated public policy by terminating her employment after she complained about sex discrimination and demanded compensation equal to that paid to the men's head coach. Complaint, ¶ 75. She further alleges Defendants acted in bad faith by refusing to honor an agreement reached on April 20, 1993, and by "refusing to negotiate the language and compensation figure of a fair and nondiscriminatory contract." Complaint, ¶ 82.

In order to sustain a claim for wrongful discharge in violation of public policy, Stanley must prove she was discharged from employment, either expressly or constructively, and that her dismissal

violated a policy that is (1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision. Turner v. Anheuser-Busch, Inc., 32 Cal. Rptr. 223, 233-34 (1994). Wrongful discharge claims typically arise when an employer retaliates against an employee for refusing to violate a statute or exercising a statutory right or privilege. Id. At 234.

As discussed above, the Court finds that Stanley was not discharged by USC. Rather, her employment contract expired, her term of employment lapsed, and she refused to accept USC's offers that would have formed a new employment contract. Thus, Stanley cannot show wrongful discharge in violation of public policy.

Stanley has also failed to prove that she was constructively discharged in violation of public policy. IN order to be constructively discharged on the basis of gender, Stanley must prove that a reasonable person in her position would have felt forced to quit because of intolerable and discriminatory working conditions. Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984). She must show more than discrimination. There must be "aggravating factors," such as a continuous pattern of discriminatory treatment. Id. At

1381-82. A discriminatory refusal to hire does not constitute a constructive discharge. Thorne v. City of El Segundo, 802 F.2d 1131, 1134 (9th Cir. 1986).

Stanley was offered substantial pay increases by USC. The multi-year contract offered on April 27, 1993, would have increased Stanley's total compensation over the terms of the contract by 54%. Garrett Decl. At 26. The one year contract with annual compensation of $96,000, offered following Stanley's rejection of the multi-year contract, would have increased her salary by 39%. It was $10,000 more than she had been offered in the first year of the multi-year contract. Id. At 29. Stanley testified that she desires to remain at USC, and that the sole reason she rejected the contract offers was that she was not offered compensation equal to that paid to Coach Raveling. See Stanley Depo., Vol 4 at 763.

Stanley was not subjected to intolerable and discriminatory working conditions. She rejected a reasonable employment contract. Stanley has not shown she was expressly or constructively discharged. Defendants USC and Michael Garrett are entitled to summary judgment on Plaintiff's wrongful discharge claim. Defendant Garrett,

in his individual capacity, is entitled to summary judgment on Stanley's wrongful discharge claim for the further reason that he may not be held liable in tort for actions taken in his supervisory capacity. McCabe v. General Foods Corp., 811 F.2d 1336, 1338 (9th Cir. 1987).

D. Contract and Covenant Causes of Action

1. Express Contract

The seventh cause of action is for breach of an express employment contract. Stanley asserts that on April 20, 1993, she and Athletic Director Garrett agreed to a multi-year contract that provided compensation equal to that paid to the men's head coach. Stanley Depo., Vol I at 16. The contract was part oral and part written. Complaint, ¶ 96.

On August 23, 1993, Stanley produced a declaration in support of her motion for preliminary injunction. Therein, she described the April 20, 1993 meeting with Garrett. During the meeting, Stanley informed Garrett that she was entitled to compensation equal to that paid to the men's basketball head coach. According to Stanley, Garrett agreed that she and Coach Raveling

performed substantially equal work and should be paid equally. However, Garrett informed Stanley that "USC did not have the money to pay [Stanley] that amount at that time," and he "indicated that he would get back to [Stanley] with an offer of a multi-year contract." Stanley Decl., August 23, 1993.

The declaration makes clear that even if the parties discussed a contract that would provide Stanley with pay equal to Coach Raveling's, such an offer was never accepted by USC. Garrett did not agree to increase Stanley's compensation beyond that offered in writing on April 27, 1993. Id. At ¶ 15. Further, in her first complaint, filed August 5, 1993, Stanley alleged that she had requested a salary increase to an amount equal to Coach Raveling's compensation, but Garrett rejected the request. Original Complaint, ¶ 11. Stanley's August 23, 1993 declaration and original complaint contradict her present position. See Stanley Depo., Vol I at 24-30.

Stanley retained Timothy Stoner to "represent [her] in her negotiation with USC." Stanley Decl., August 23, 1993, ¶ 16. On July 28, 1993, Stoner wrote to Robert Lane, Acting General Counsel at USC, concerning Stanley's contract. Stoner began the letter by

stating that he had contacted Garrett "in an effort to begin contract negotiations on behalf of Coach Stanley." Exh. 107 to Stanley Depo, at 1. Stoner explained in detail his discussion with Garrett. Stoner explained in detail his discussion with Garrett. Stoner concluded the letter to Lane by saying that he hoped to resolve the issue of Stanley's contract "so that [Stanley] can spend her energies preparing for what promises to be her best season yet, instead of worrying about whether or not she has a contract."

During the contract negotiations prior to the filing of the complaint on August 5, 1993, neither Stanley nor Stoner believed she had reached an agreement with USC. Only in the third declaration filed herein, dated September 1, 1993, does Stanley assert for the first time that on April 20, 1993 she and Garrett agreed that USC would compensate her at the same level of compensation paid to Coach Raveling. Stanley Decl., September 1, 1993, ¶ 15. The Court finds that no rational trier of fact could find that Stanley and Garrett entered into such an agreement. There was no meeting of the minds on any aspect of an employment agreement. Such a claim contradicts Stanley's prior declaration and the allegations in her first complaint,

and is insufficient to create a genuine issue of material fact. Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543-44 (9th Cir. 1975). Hence, USC and Michael Garrett are entitled to summary judgment on the express contract claim.

2. Implied Contract

The sixth cause of action is for breach of an implied-in-fact employment contract. Stanley alleges that USC, through its agents and officials, led her to believe that if she produced a successful basketball program she would be awarded a multi-year contract with "equal pay for equal work." Complaint, ¶ 86. This representation was confirmed by the USC Staff Handbook which states that it is USC's policy to pay equal wages to employees performing equivalent jobs. IN reliance on representations made to Stanley while she was head coach, she believed that she would remain at USC until retirement and did not seek or pursue other coaching positions. Complaint, ¶ 87.

California Civil Code § 1621 defines an implied contract as one "the existence and terms of which are manifested by conduct." An implied contract "consists of obligations arising from a mutual

agreement and intent to promise where the agreement and promise have not been expressed in words." Silva v. Providence Hosp. Of Oakland, 14 Cal. 2d 762, 773 (1939).

The California Supreme Court has held that employment security agreements may arise by implication under the same principles as other implied contracts. Foley v. Interactive Data Corp., 47 Cal.3d 675, 254 Cal. Rptr. 211 (1988). The existence and content of an implied contract may be ascertained from such factors as "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." Id. At 225.

In Foley, the California Supreme Court stated that enforcement of an implied-in-fact modification of an ongoing employment agreement is precluded by an express written provision to the contrary. Id. At 225 n.23. The Foley Court left unanswered the question of whether an express agreement can ever be modified by an implied-in-fact contract. Id. In DeHorney v. Bank of America Nat. Trust and Savings Assoc., 879 F.2d 459, 466 (9th Cir. 1989), the

plaintiff claimed that her written contract with the Bank of America was modified by an implied-in-fact contract to terminate for good cause only. The plaintiff contended that the bank's conduct and policies of "fair treatment and good career opportunities" created an implied contract with terms contrary to the express provisions of her written contract. Id. The Court held that the pliantiff could not have reasonably believed that the bank's personnel policies modified the clear terms of her employment contract, and that no implied-in-fact contract existed. Id.

Stanley contends that she is entitled to the benefits of an implied-in-fact multi-year contract because she turned the women's basketball team into a winning program. This contention contradicts the clear terms of the written employment contract. USC agreed to employ Stanley to June 30, 1993, at which time the contract lapsed. Paragraph 12 of Stanley's written employment contract provides:

> This Agreement represents the full an final agreement between the parties, and no prior or contemporaneous agreements, written or oral, not directly set forth or incorporated herein shall be of any force or effect.

Thus, any prior representations by USC cannot form the basis for an

implied-in-fact contract. As for representations made during the term of her employment, paragraph 14 of the Contract provides:

> No modification or cancellation of this Agreement shall be valid unless it is in writing, signed by the parties hereto.

Stanley could not have reasonably believed that the policies of the university or her success as a coach modified the clear terms of her employment contract and guaranteed her a multi-year extension to the contract. She has raised no triable issue of fact as to the existence of an implied-in-fact contract. Defendants USC and Michael Garrett are entitled to summary judgment on the implied-in-fact contract claim.

3. Covenant of Good Faith and Fair Dealing

The eighth cause of action is for breach of the implied covenant of good faith dealing. Stanley contends USC and Garrett breached the covenant of good faith and fair dealing in her four-year employment contract by not paying her compensation equal to that paid to Coach Raveling over the same period, and by not negotiating in good-faith to renew the contract. Complaint, paras. 109, 112. Further, the Defendants acted in bad faith when they refused to

commit to writing the multi-year contract allegedly agreed upon by Garrett and Stanley on April 20, 1993. Complaint, paras. 121-25.

The covenant of good faith and fair dealing arises when the parties enter into a contract. Foley, 47 Cal.3d at 683, 254 Cal. Rptr. At 227. Every contract imposes upon each party a duty to act in good faith in performance and enforcement of the contract. The covenant is a contract term, and damages for its breach are limited to contract rather than tort remedies. Id. At 699, 254 Cal. Rptr. At 239.

The claim depends on the existence of a valid contract. Careau & Co. v. Security Pacific, 222 Cal.App.3d 1371, 1391-92, 272 Cal. Rptr. 387, 397 (1990) In the employment context, a breach of the implied covenant of good faith and fair dealing is established when the employer engages in "bad faith action extraneous to the contract, combined with the . . . intent to frustrate the [employee's] enjoyment of contract rights." Id. At 698, 254 Cal. Rptr. At 238, quoting Khanna v. Microdata Corp., 170 Cal.App.3d 250, 262, 215 Cal. Rptr. 860, 867 (1985).

Stanley has not produced evidence sufficient to justify a finding that a contract was formed between USC and Stanley on April

20, 1993. When her employment contract expired on June 30, 1993, Stanley ceased to be employed by USC. Thus, Stanley has no claim that USC breached the covenant of good faith and fair dealing in "Plaintiff's Second Multi-year Contract," or "Implied-in-Fact Multi-year Contract," because she has not shown that the parties entered such contracts.

With respect to her four-year employment contract that expired on June 30, 1993, Stanley has not produced evidence sufficient to support a finding that USC acted in bad faith or attempted to frustrate Stanley's rights under the contract. The employment contract specified Stanley's compensation. Employment Contract, Exh. 101 to Stanley Depo., paras. 2-5. It cannot be the case that USC acted in bad faith by paying the agreed-upon compensation. The covenant of good faith and fair dealing cannot be used to imply an obligation contrary to the terms of the written contract. Tollefson v. Roman Catholic Bishop, 219 Cal.App.3d 843, 854, 268 Cal. Rptr. 550, 556 (1990).

Nor did USC act in bad faith in the negotiations with Stanley. USC had no obligation to extend Stanley's employment contract, and

Stanley presents no evidence that USC failed to negotiate in good faith. A multi-year contract proposal that provided Stanley a substantial salary increase was offered by USC and remained open for over six weeks. Stanley rejected the offer. When it appeared that USC and Stanley would not be able to reach an agreement, Garrett began to search for a new coach in order to protect the University and the women's basketball program. See Garrett Decl., ¶ 29. There was no breach by USC, and thus there was no bad faith. USC and Michael Garrett are entitled to summary judgment on Stanley's bad faith claim.

This Court has held that Garrett cannot be named as an individual defendant in the contract claims if he is not a party to the alleged contracts. See February 4, 1994 Order. As discussed above, Garrett was Stanley's supervisor and not her employer. In negotiating with Stanley to renew her employment contract, Garrett acted on behalf of USC, and not for his own benefit. For this additional reason, Garrett is entitled to summary judgment on the sixth, seventh, and eighth causes of action.

V.

Conclusion

For the reasons stated above, the Defendants are entitled to summary judgment on each and every one of the Plaintiff's causes of action. Accordingly, the motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

Dated: MAR 8 1995

/s/
JOHN G. DAVIES
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JULY 16 1999

MARIANNE STANLEY,	) Nos. 95-55466; 95-56250;
	) 96-55004
Plaintiff-Appellant,	)
	) D.C. No. CV-93-4708-JGD
V.	)
	)
UNIVERSITY OF SOUTHERN CALIFORNIA and MICHAEL GARRETT,	) ORDER
	)
	)
Defendants-Appellees.	)

Before: HUG, Chief Judge; REINHARDT and PREGERSON, Circuit Judges.

Chief Judge Hug and Judge Reinhardt have voted to deny appellant's petition for rehearing and petition for rehearing en banc. Judge Pregerson has voted to grant appellant's petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear

the matter en banc. Fed.R.App.P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENTERED
CLERK, U.S. DISTRICT COURT
AUG 6 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

No. 95-55466
CT/AG#: CV-93-04708-JGD

MARIANNE STANLEY

Plaintiff - Appellant

V.

THE UNIVERSITY OF SOUTHERN CALIFORNIA;
MICHAEL L. GARRETT, individually and in his official capacity as Athletic Director

Defendants - Appellees

No. 95-56250
CT/AG#: CV-93-04708-JGD (Jgx)

MARIANNE STANLEY;

Defendant - Appellant

UNIVERSITY OF SOUTHERN CALIFORNIA;
MICHAEL L. GARRETT, individually & in his official capacity as Athletic Director

Defendants - Appellees

No. 96-55004
CT/AG#: CV-93-04708-JGD

MARIANNE STANLEY

Plaintiff - Appellant

V.

UNIVERSITY OF SOUTHERN CALIFORNIA;
MICHAEL L. GARRETT

Defendants - Appellees

___ DOCKETED
___ SCANNED
___ MLD NOTICE PTYS
___ JS-6

AUG 1999

ENTERED ON ICMS /S/

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED on the district court's grant of summary judgment in favor of USC and Garrett and its denial of the motion for disqualification. However, we deny appellees' moti[o]ns for sanctions. Each side shall bear its own costs on appeal.

Filed and entered JUNE 2, 199[9]

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUL 23 1999

By /s/
Deputy Clerk

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIANNE STANLEY,	) Nos. 95-55466
	) 95-56250
Plaintiff-Appellant,	) 96-55004
	)
	) D.C. No.
	) CV-93-4708-JGD
UNIVERSITY OF SOUTHERN CALIFORNIA and MICHAEL GARRETT, individually and in his official capacity as Athletic Director,	) OPINION
Defendants-Appellees.	)

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
October 7, 1996 - Pasadena, California

Submission withdrawn November 28, 1997
Resubmitted May 24, 1999

Filed June 2, 1999

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

Opinion by Chief Judge Hug;
Dissent by Judge Pregerson

SUMMARY

Individual Rights/Employment Discrimination

The court of appeals affirmed in part a judgment of the district court, reversed in part, and remanded to re-tax costs. The court held that a university does not violate the Equal Pay Act by paying a lower salary to a female athletic coach performing the same core responsibilities as a male coach who has substantially more experience and significantly superior qualifications.

Appellant Marianne Stanley was hired as head coach of the women's basketball team for the University of Southern California (USC) in 1989. Her initial contract expired June 30, 1993, and provided for a base salary of $60,000 per year.

On April 20, 1993, Stanley met with USC's Athletic Director appellee Michael Garrett to negotiate a new contract. Stanley believed that on that date she entered into a contract for a salary equivalent to that of USC men's basketball coach George Raveling. Garrett expressly stated that USC could not pay her that salary, but that he would make her a formal offer in writing shortly after that meeting.

On April 27, Garrett offered Stanley a three-year contract providing a significant pay increase over her previous salary. According to Garrett, Stanley rejected the April 27 offer because she insisted that her compensation should be equivalent to Raveling's. According to Stanley, she never rejected the offer, but simply disagreed as to the amount of compensation, because the April 27 offer was inconsistent with the April 20 offer - for Raveling's salary level - that she already had accepted.

Stanley proposed a three-year contract providing $96,000 per year for the first eighteen months, and a salary equivalent to that of

Raveling for the remainder of the term. Garrett rejected this offer. Stanley then proposed a three-year contract with an automatic two-year renewal provision, plus additional incentives. Garrett rejected this offer and withdrew the April 27 offer.

Garrett offered Stanley a one-year contract for $96,000. Stanley's existing contract had expired, but she continued to perform her duties. When Stanley asked Garrett if he would still offer her a multi-year contract, he indicated that his one-year contract offer was USC's final offer, and that Stanley would have to accept or reject it by the end of the day. Stanley requested additional time to consider the offer. Garrett revoked the offer and requested that Stanley perform no further services for USC.

Stanley filed a claim in Superior Court, alleging sex discrimination and retaliatory discharge. The state court granted her request for a temporary restraining order reinstating Stanley as head coach of the women's team at $96,000 per year pending the hearing on Stanley's motion for preliminary injunction. USC and Garrett removed the action to federal court.

Stanley alleged: (1) violation of the Equal Pay Act and California Fair Employment and Housing Act (FEHA); (2) violation of Article I, § 8 of the California Constitution; (3) violation of Title IX of the Civil Rights Act of 1972; (4) retaliation; (5) wrongful discharge in violation of public policy; (6) breach of express contract; (7) breach of implied-in-fact contract; and (8) breach of the implied covenant of good faith and fair dealing. Stanley sought reinstatement, declaratory relief, injunctive relief preventing USC from further discriminating against her, back pay, compensatory damages, and punitive damages.

The district court granted summary judgment for USC and Garrett and awarded costs to USC and Garrett as prevailing parties pursuant to Fed.R.Civ.P. 54(d)(1). Stanley moved to re-tax costs, arguing that: (1) many of the costs were excessive; (2) she in fact was a "prevailing party" in the litigation due to her success in procuring

the TRO in Superior Court; (3) forcing civil rights plaintiffs, like herself, to pay costs would have the chilling effect of dissuading other civil rights plaitniffs from bringing meritorious suits; (4) she was unable to pay the costs without being rendered indigent; and (5) Judge Davies exhibited gender bias toward Stanley in the underlying proceedings.

The district court determined that Stanley did not overcome the presumption in favor of taxing costs to the losing party.

Stanley appealed.

[1] In an Equal Pay Act claim, the plaintiff has the burden of establishing a prima facie case of discrimination by showing that employees of the opposite sex were paid different wages for equal work. The prima facie case is limited to a comparison of the jobs in questions, and does not involve a comparison of the individuals who hold the jobs. The plaintiff need not demonstrate that the jobs are identical; she must show only that the jobs are substantially equal.

[2] Circuit courts employ a two-step "substantially equal" analysis in Equal Pay Act cases. The crucial finding is whether the jobs have a common core of tasks (i.e. whether a significant portion of the two jobs is identical.) When a plaintiff establishes a common core of tasks, the court then determines whether any additional tasks, incumbent on one job but not the other, make the two jobs substantially different.

[3] The USC men's and women's coaching jobs shared a common core of tasks.

[4] A defendant may rebut a prima facie case by showing that the disparity in pay is a differential based on any factor other than sex. Stanley and Raveling had markedly disparate levels of experience and qualifications. When Raveling began coaching at U.S.C., he ahd 31 years of coaching experience, had been the coach of the men's Olympic basketball team, had been twic named national coach of the

year, and twice named PAC-10 coach of the year. Raveling also had nine years of marketing and promotional experience, and was the author of several books on basketball. When Stanley started coaching at U.S.C., she had 17 years of experience coaching basketball, had never coached an Olympic team, and had no marketing or promotional experience other than that she gained as a coach, and had never published a book about basketball.

[5] Superior experience, education, and ability may justify pay disparities if distinctions based on these criteria are not gender based. Employers may reward professional experience and education without violating the EPA. Coaches with substantially more experience and significantly superior qualifications may be paid more than their less experienced and qualified counterparts, even when it is the male coach who has the greater level of experience and qualifications. By alleging that the pay differential was due to Stanley and Raveling's different levels of experience and qualifications, the defendants proffered a factor other than sex to explain the difference in pay.

[6] Where the defendant demonstrates that a pay differential was based on a factor other than sex, the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a pretext for discrimination. Stanley bore the burden of demonstrating a material fact regarding pretext to survive summary judgment.

[7] Stanley's unsupported allegations were not sufficient to defeat a motion for summary judgment. She failed to present any meaningful evidence in support of her claim that she and Raveling had comparable levels of experience.

[8] As Stanley failed to show any discriminatory conduct on USC's part, her FEHA, Title IX and California Constitution claims failed.

[9] USC did not retaliate against Stanley because she insisted that USC honor Garrett's "offer" of April 20, 1993, filed a

discrimination claim with Department of Fair Employment and Housing, and filed a complaint in state court. USC's offer of a multi-year contract remained open long after Stanley insisted that she be paid an amount equal to Raveling's salary. USC did not discharge Stanley in response to any of her arguably protected activity. Rather, Stanley's contract expired and she was unable to renegotiate a new contract acceptable to her.

[10] Stanley failed to present evidence that she was "terminated" from her coaching position, either directly or constructively, after her complaints.

[11] The district court correctly granted summary judgment for Garrett on the contract claims, because he acted merely as USC's agent and was not a party to the contract.

[12] No rational trier of fact could have concluded from the evidence that there was a meeting of the minds between Garrett and Stanley on the terms Stanley proposed.

[13] Under California law, an implied contract is one the existence and terms of which are manifested by conduct. An implied contract consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. [14] No rational trier of fact could have concluded that Stanley had a reasonable belief that her express written contract was modified such that she was guaranteed a multi-year contract so long as she performed her job well.

[15] A claim for breach of an implied good faith covenant depends upon the existence of a valid contract. As Stanley had no valid contract based upon the April 20, 1993 meeting, her claim failed with respect to that alleged contract.

[16] USC did not act in bad faith with respect to the contract that expired June 30, 1993. USC paid Stanley according to the terms

of that contract and no rational factfinder could have concluded that USC acted in bad faith during negotiations for a new contract. USC offered Stanley a new contract at a substantially higher salary than her previous contract provided, and engaged in repeated negotiations in an attempt to reach an agreement. Bad faith could not be inferred from the fact that Stanley was unhappy with USC's proposed terms.

[17] General observations about gender discrimination do not support a disqualification motion. Judge Davies' rulings in Stanley's case did not present the rare and extreme circumstances in which a judge may be recused on the basis of his rulings alone.

[18] Rule 54(d) creates a presumption in favor of awarding costs to prevailing parties, and it is incumbent upon the losing party to demonstrate why the costs should not be awarded.

[19] The district court abused its discretion in failing to consider Stanley's indigency, and the chilling effect of imposing such high costs on future civil rights litigants. [20] District courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases. Stanley's argument that payment of the costs would render her indigent was compelling. Indigency is a factor that the district court may properly consider in deciding whether to award costs.

[21] The imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. Stanley's claims raised important issues. Without civil rights plaintiffs willing to test the boundaries of the laws, this nation would not have made much of the progress that has occurred.

Judge Pregerson dissented, stating that by focusing on the differences between Stanley's and Raveling's qualifications, the majority had skipped over the many ways in which gender discrimination insidiously affected the treatment of the women's basketball program and Stanley as its head coach.

COUNSEL

Robert L. Bell, Law Offices of Robert L. Bell, Washington, D.C. for the plaintiff-appellant.

J. Al Latham, Jr., Paul, Hastings, Janofsky & Walker, Los Angeles, California for the defendants-appellees.

OPINION

HUG, Chief Judge:

Appellant Marianne Stanley appeals from the district court's order granting summary judgment in favor of defendants University of Southern California and Michael Garrett on Stanley's claims of discrimination and breach of employment contract. Stnaley also appeals the denial of her motion to recuse Judge Davies, and her motion to re-tax costs. Appellants move for an award of sanctions against Stanley for filing the latter two appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Marianne Stanley was hired as head coach of the women's basketball team for the University of Southern California ("USC") in 1989. Her initial contract, signed in July of that year, was for a four-year term, expiring June 30, 1993. The contract provided that she would make a base salary of $60,000 per year. This base salary was increased to $62,000 per year in 1992. The women's basketball program at USC enjoyed much success during Stanley's tenure.

Defendant Michael Garrett is the Athletic Director at USC. On April 20, 1993, two months prior to the expirations of Stanley's contract, Stanley and Garrett had an initial meeting to negotiate a new contract. The parties disagree over what took place at this meeting.

Stanley contends that on that date she entered into a contract for a salary equivalent to that of George Raveling, the USC men's basketball coach. It is undisputed that Garrett expressly stated that USC could not pay her that salary, but that he would make her a formal offer in writing shortly after that meeting.

On April 27, 1993, Garrett offered Stanley, in writing, a three-year contract providing $80,000 in year one, $90,000 in year two, and $100,000 in year three, with a $6,000 per year housing allowance for each of the three years. The parties met again on May 27, 1993, at which point Garrett claims that Stanley rejected the April 27 offer because she insisted that her compensation should be equivalent to Raveling's. Stanley argues that she never rejected this offer, but simply disagreed as to the amount of compensation, because the April 27 offer was inconsistent with the April 20 offer - for Raveling's salary level - that she already had accepted.

On June 7, 1993, Stanley proposed a three-year contract providing $96,000 per year for the first eighteen months, and a salary equivalent to that of Raveling for the remainder of the term. Garrett rejected this offer. Stanley then retained an attorney who, on June 18, 1993, proposed to garrett a three-year contract with an automatic two-year renewal provision, and total compensation of $88,000 for year one, $97,000 for year two, and $112,000 for year three, plus additional incentives. Garrett rejected this offer and withdrew the April 27 offer.

On June 21, 1993, Garrett sent to Stanley's attorney a written offer for a one-year contract for $96,000. Stanley's existing contract expired on June 30, 1993, but Stanley continued to perform her duties. On July 13, while on a recruiting trip, Stanley asked Garrett if he would still offer her a multi-year contract. He indicated that his June 21 one-year contract offer was USC's final offer, and that Stanley would have to accept or reject it by the end of the day. Stanley did not respond, but sent a memo to Garrett on July 14 requesting additional time to consider the offer. On July 15 Garrett revoked the offer, informed Stanley that he was seeking a new coach for the team, and

requested that Stanley perform no further services for USC.

On August 5, 1993, Stanley initiated this action in Los Angeles County Superior Court, making claims of sex discrimination and retaliatory discharge. On August 6, 1993, the Superior Court granted Stanley's request for a temporary restraining order reinstating Stanley as head coach of the women's team at $96,000 per year pending the hearing on Stanley's motion for preliminary injunction. On that same day, defendants removed the action to federal court on the ground that the complaint stated claims arising under federal law.

On August 30, 1993, the district court denied the motion for preliminary injunction, and Stanley appealed. This court affirmed the denial of the preliminary injunction in an opinion filed January 6, 1994. *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994) ("Stanley I"). Between September 1993 and February 1994, Stanley amended her complaint several times, and defendants' motions to dismiss were granted as to several claims. Stanley's Third Amended Complaint alleges the following causes of action: (1) violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1) and California Fair Employment and Housing Act ("FEHA"); (2) violation of Article I, § 8 of the California Constitution; (3) violation of Title IX of the Civil Rights Act of 1972, 20 U.S.C. § 1681; (4) retaliation; (5) wrongful discharge in violation of public policy; (6) breach of express contract; (7) breach of implied-in-fact contract; and (8) breach of implied covenant of good faith and fair dealing. Stanley sought reinstatement, declaratory relief, injunctive relief preventing USC from further discriminating against her, back pay, three million dollars in compensatory damages, and five million dollars in punitive damages.

On October 17, 1994, defendants filed a motion for summary judgment. After Stanley was allowed additional time to conduct discovery, on March 10, 1995, the district court granted summary judgment for USC and Garrett. This appeal followed.

DISCUSSION

1. Discrimination Claims

We review the district court's grant of summary jdugment de novo. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). We address each claim in turn.

A. Equal Pay Act Claim

The Equal Pay Act provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

[1] In an Equal Pay Act case, the plaintiff has the burden of establishing a prima facie case of discrimination by showing that employees of the opposite sex were paid different wages for equal work. The prima facie case is limited to a comparison of the jobs in questions, and does not involve a comparison of the individuals who hold the jobs. See, e.g., *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir. 1985) (citing *Hein v. Oregon College of Educ.*, 718 F.2d 910, 914 (9th Cir. 1983). To make out a prima facie case, the plaintiff bears the burden of showing that the jobs being compared are "substantially equal." See 29 C.F.R. § 1620.13(a); see

also *Spaulding v. University of Wash.*, 740 F.2d 686, 697 (9th Cir. 1984), overruled on other grounds, *Atonio v. Wards Cove Packinig Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (en banc). Significantly, under the Act, the plaintiff need not demonstrate that the jobs in question are identical; she must show only that the jobs are substantially equal.

Because we are reviewing an appeal from the grant of summary judgment, the question is whether, viewing the evidence in the light most favorable to Stanley, and resolving all inferences in her favor, a genuine issue of material fact exists regarding the substantial equality of the jobs. See, e.g., *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1150 (9th Cir. 19978). This analysis is quite different from that conducted by our court in *Stanley I*, 13 F.3d 1313 (9th Cir. 1994), where we considered an appeal from the denial of a mandatory preliminary injunction.

[2] Circuit courts employ a two-step "substantially equal" analysis in Equal Pay Act cases. In *Brobst v. Columbus Srvs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985), the Third Circuit described this approach, writing that "[t]he crucial finding on the equal work issue is whether the jobs to be compared have a 'common core' of tasks, i.e. whether a significant portion of the two jobs is identical." When a plaintiff establishes such a "common core of tasks," the court must then determine whether any additional tasks, incumbent on one job but not the other, make the two jobs "substantially different." Id. Both the Seventh and Fourth Circuits have also adopted this approach to Equal Pay Act cases. See *Fallon v. State of Illinois*, 882 F.2d 1206, 1209 (7th Cir. 1989); *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986).

[3] Here, we may assume that the men's and women's coaching jobs share a common core of tasks. Garrett - U.S.C.'s athletic director and a defendant in this case - has acknowledged that the women's and men's coaches "have the same basic responsibilities" with regard to recruiting athletes and administering the basketball programs. In his declaration Garrett also stated:

> Both the women's and men's head basketball coaches have the following general duties and responsibilities: basketball program; coaching and discipline of team members; general supervision over the personal and academic lives of the student athletes; and supervision over assistant coaches, part-time coaches and other athletic department personnel involved in the women's and men's basketball programs.

The parties are in serious dispute, however, as to whether the additional responsibilities borne by the men's coach, but not by the women's coach, suffice to make the two jobs "substantially different." See, e.g., *Fallon*, 882 F.2d at 1209. The defendants point out that the men's coach bears greater revenue generating responsibilities, that he is under greater media and spectator pressure to produce a winning program, and that he actually generates more revenue for the University.

Stanley claims that the differences between the two jobs are attributable to previous gender-based decisions on the part of the University. Essentially, Stanley claims that the differences between the two jobs result from the University's historically disparate treatment of male and female teams; namely, its decisions to invest in and promote the men's program more than the women's program. She then claims that because the differences between the jobs derive from previous gender based decisions on the part of the University, the differences cannot be relied on to determine that the jobs are "substantially different."[1]

---

[1]In a recent EEOC Notice of sex discrimination in the compensation of sports coaches in educational institutions, see EEOC Notice No. 915.002, the EEOC states explicitly that "pay discrimination cannot be justified if the differences relied on for the proposition that the two jobs are not substantially equal are themselves based on discrimination in the terms and conditions of employment." See Notice at 5 (citing *Burkey v. Marshall County*

The University, on the other hand, argues that the differences between the two jobs are not attributable to anything it has done or failed to do in the past. According to USC, the reason that women's basketball does not generate the same amount of revenue as men's basketball, and that the women's coach is not under the same pressure as the men's coach, is that there simply is not a sufficient spectator or media market for women's basketball games. Accordingly, it contends that the differences in responsibilities in the two jobs legitimately suffice to make them "substantially different."

[4] We need not decide which party is correct regarding the reason for the differences that exist. Even assuming that Stanley has succeeded in raising a genuine issue of fact as to this question, the University is entitled to summary judgment on other grounds. A defendant may rebut a prima facie case by showing that the disparity in pay is a "differential based on any . . . factor other than sex." 29 U.S.C. § 206(d)(1). Defendants here assert an affirmative defense (that is, a nondiscriminatory reason for the pay differential) based on Stanley and Raveling's markedly disparate levels of experience and qualifications. The record convincingly supports their claim. When Raveling began coaching at U.S.C., he had thirty-one years of coaching experience. He had been the coach of the men's Olympic basketball team. He had been *twice* named national coach of the year, and *twice* named PAC-10 caoch of the year. On top of his coaching experience, Raveling also had nine years of marketing and promotional experience, and was the author of several books on basketball. When Stanley started coaching at U.S.C., three years after Raveling became head coach of the men's team, she had seventeen years of experience coach basketball, or fourteen years less experience than Raveling. She never coached an Olympic team. She had no marketing or promotional experience other than that she gained as a

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Bd. Educ., 513 F. Supp. 1084, 1092 (N.D. W. Va. 1981).

coach. She had never published a book about basketball.[2]

[5] The EEOC Notice cited above, on which the plaintiff relies extensively, recognizes this type of affirmative defense, stating that "[s]uperior experience, education, and ability may justify pay disparities if distinctions based on these criteria are not gender based." EEOC Notice at 23. In *Stanley I*, moreover, we wrote that "[e]mployers may reward professional experience and education without violating the EPA." *Stanley I*, 13 F.3d at 1322. Coaches with substantially more experience and significantly superior qualifications may, of course, be paid more tahn their less experienced and qualified counterparts, even when it is the male coach who has the greater level of experience and qualifications. By alleging that the pay differential at issue here was due to Stanley and Raveling's markedly different levels of experience and qualifications, the defendants have proffered a factor "other than sex," 29 U.S.C. § 206(d)(1), to explain the difference in pay. See also, *Harker v. Utica College of Syracuse Univ.*, 885 F. Supp. 378 (N.D.N.Y. 1995) (nine year experience differential between women's and men's basketball coaches justified pay differential).

Garrett's testimony, moreover, supports the University's explanation. In explaining the disparity between Raveling and Stanley's salaries, Garrett referred extensively to the coaches' divergent levels of experience and differences in qualifications. He stressed Raveling's thirty-one years of experience, his expereience as an Olympic coach, his nine years in marketing and promotion positions, and his authorship of several books on basketball. Garrett highlighted the fact that Raveling had been twice honored as national coach of the year, twice voted PAC-10 coach of the year, and was

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[2]Michael McGee, USC's athletic director at the time Raveling and Stanley were hired, testified that, due to his stellar qualifications and experience, Raveling was the *only* candidate considered for the men's coaching job. Stanley, on the other hand, was hired only after two other candidates turned down the women's coaching job.

"widely recognized as one of the top basketball recruiters in the nation." Garrett then contrasted Stanley's lesser experience and qualifications. While he mentioned some of Stanley's accomplishments, he pointed out that she had only seventeen eyars coaching experience, had never coached an Olympic team, and had never authored any books on basketball.[3]

[6] Where the defendant demonstrates that a pay differential was based on a factor other than sex, the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a "pretext for discrimination." *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (1986). On this appeal, Stanley bears the burden of demonstrating a material fact regarding pretext in order to survive summary judgment. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

[7] Stanley's pretext argument, however, fails to meet even this minimal burden. In her briefs, Stanley disputes that Raveling had greater qualifications and experience than she.[4] For example, Stanley states that "Mr. Raveling does not have substantially different qualifications and experience than Ms. Stanley." Unsupported allegations made in briefs are not sufficient, however, to defeat a motion for summary judgment. See, e.g., *Anderson v. Liberty Lobb,*

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[3]Garrett concluded his explanation by noting that Raveling, the more experienced and qualified coach, had to be "sought out by USC and lured away from his then-current employer, the University of Iowa, to accept the head coaching job of the men's basketball team at USC." In contrast, Garrett continued, Stanley, the less experienced and qualified coach, "initiated contact with USC and actively pursued the employment opportunity."

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[4]Stanley does not argue, however, that the University did not, in fact, rely on experience and qualification levels when setting the coaches' salaries.

Inc., 477 U.S. 242, 249 (1986). Stanley has conspicuously failed, moreover, to present any meaningful evidence in support of her claim that she and Raveling had comparable levels of experience. Stanley points first to her deposition testimony that she was responsible for securing donors for the women's team. Such evidence, while important in assessing Stanley's revenue raising responsibilities, says nothing of her relative level of experience. She next points to her testimony that she worked briefly as a color analyst on a Philadelphia cable station. Again, this evidence does not undermine the University's claim that Raveling possessed far greater experience as a coach and marketer than Stanley.[5] Stanley also argues that Raveling's marketing abilities are in dispute because "Raveling was not able to successfully promote nor market a summer basketball [camp] during his entire employment at USC." However, Raveling's ability to market this camp sheds no light on his previous *experience* in marketing. Stanley, moreover, does not dispute the fact that Raveling has nine years of experience in marketing, while she had no work experience outside coaching.

In the end, therefore, we are left with these *undisputed* facts: Stanley had far less relevant experience and qualifications than Raveling. She had fourteen years less experience as a basketball coach. She, unlike Raveling, never coached the Olympic team. She had no marketing experience outside coaching. She had never written any books on basketball. Accordingly, Stanley has failed to raise a genuine issue of fact as to Raveling's markedly "superior experience,," and qualifications. EEOC Notice at 23. In short, she has failed to raise a genuine issue of fact as to the University's non-discriminatory reason for paying Raveling a higher salary.

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[5]Stanley also contends that Raveling misrepresented to the district court that he was the author of several "bestsellers" on the subject of basketball. Stanley, conspicuously, does not dispute the fact that she has published no books on this or any other subject, while Raveling indisputably has.

Accordingly, we affirm the district court's decision to grant the defendants' motion for summary judgment on the Equal Pay Act claim.

B. FEHA, Title IX, and California Constitution

Stanley also claims that the defendants' conduct violated three other statutory provisions. First, she asserts that the failed contract negotiations constituted a violation of the Fair Employment Housing Act which provides that it is unlawful for an employer to "discriminate against the person in compensation or in terms, conditions or privileges of employment" on the basis of gender. Cal. Gov't Code § 12940(a). Second, she claims a violation of Title IX of the Civil Rights Act of 1972, 20 U.S.C. § 168(a), which provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ..

Third, she claims a violation of Article I, § 8 of the California Constitution which provides:

> A person may not be disqualified from entering or pursing a business, profession, vocation, or employment because of sex . . . .

[8] Because, as we have held above, Stanley fails to show any discriminatory conduct on the part of the defendants, all of these claims fail as well.

C. Retaliation

[9] Stanley's retaliation claim fails because, as the district court concluded, the evidence does not support her assertion that USC "retaliated" against her because she insisted that USC honor Garrett's "offer" of April 20, 1993, filed a discrimination claim with Department of Fair Employment and Housing, and filed a complaint in state court. USC's offer of a multi-year contract remained open long after Stanley insisted that she be paid an amount equal to Raveling's salary. USC did not "discharge" Stanley in response to any of her arguable protected activity. Rather, Stanley's contract expired and she was unable to renegotiate a new contract acceptable to her. The district court did not err in granting summary judgment for USC on this claim.

D. Tameny Claim

[10] Stanley claims that she was terminated, in violation of public policy, in response to her complaints about sex discrimination and her demands for equal pay. See *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980). However, as explained above, Stanley failed to present evidence that she was "terminated" from her coaching position, either directly or constructively, after her complaints. The evidence establishes that her contract expired and she was unable to renegotiate a new contract with terms acceptable to her. The district court properly granted summary judgment on this claim.

II Contract Claims

[11] We review the district court's grant of summary judgment on the contract claims de novo. *Margolis*, 140 F.3d at 852. As an initial matter, we conclude that the district court was correct to grant summary judgment for Garrett on the contract claims, because he acted merely as USC's agent and was not a party to the contract. We also affirm the district court's grant of summary judgment in favor of USC on all three contract claims.

A. Express Employment Contract

Stanley contends that an express contract was formed at the April 20, 1993 meeting between her and Garrett, which contract called for her to receive a salary equal to that earned by Raveling. However, Stanley herself stated in a declaration that at that meeting Garrett told her, in response to her request for a salary equal to Raveling's, "that USC did not have the money to pay [Stanley] that amount at that time. He indicated that he would get back to [Stanley] with an offer of a multi-year contract." This is consistent with Stanley's deposition testimony as well.

[12] The district court was correct to conclude that no rational trier of fact could have concluded from this evidence that there was a meeting of the minds between Garrett and Stanley on the terms Stanley proposed. Summary judgment was properly granted.

B. Implied-in-Fact Employment Contract

[13] Under California law, an implied contract is one "the existence and terms of which are manifested by conduct." Cal. Civil Code § 1621. An implied contract "consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." *Silva v. Providence Hosp. Of Oakland*, 14 Cal.2d 762, 773 (1939).

[14] Stanley contends that USC led her to believe that, if she produced a successful basketball program, she would be awarded a multi-year contract with equal pay for equal work. However, as the district court noted, the express terms of Stanley's contract precluded such a modification to the terms of her employment. Paragraph 12 of the employment contract provided taht no prior or contemporaneous agreements not set forth in the written agreement would have any force or effect, while Paragraph 14 precluded any modification of the agreement unless it was in writing and signed by both parties. Therefore, the district court was correct to conclude that no rational trier of fact could conclude that Stanley had a reasonable belief that

her express written contract was modified such that she was guaranteed a multi-year contract so long as she perfomred her job well. See *Haggard v. Kimberly Quality Care, Inc.*, 46 Cal.Rptr.2d 16, 21-21 (Cal. Ct. App. 1995) (plaintiff cannot rely on pre-contract implied terms when contract was integrated; plaintiff cannot rely on post-contract implied terms when contract required all modifications be written). Summary judgment was properly granted.

C. Good Faith and Fair Dealing

[15] Stanley contends that USC breached an implied covenant of good faith and fair dealing with USC failed to pay her a salary equal to Raveling's, when it failed to negotiate in good-faith to renew the contract, and when it refused to reduce to sriting the "contract" that Garrett entered into on USC's behalf at the April 20, 1993 meeting. However, a claim for breach of an implied good faith covenant depends upon the existence of a valid contract. *Careau & Co. v. Security Pacific Bus. Credit, Inc.*, 272 Cal.Rptr. 387, 397 (Cal. Ct. App. 1990). Thus, because Stanley had no valid contract based upon the April 20, 1993 meeting, her claim fails with respect to that alleged contract.

[16] Moreover, the record evidence does not support Stanley's claim that USC acted in bad faith with respect to the written contract that expired June 30, 1993. USC paid Stanley according to the terms of that contract, and no rational factfinder could conclude that USC acted in bad faith during negotiations for a new contract. Indeed, USC offered Stanley a new contract at a substantially higher salary than her previous contract provided, and engaged in repeated negotiations in an attempt to reach an agreement. Bad faith cannot be inferred from the mere fact that Stanley was unhappy with USC's proposed terms. Summary judgment was properly granted.

III Disqualification of Judge Davies

[17] Stanley contends that it was an abuse of discretion for Judge Collins to deny Stanley's motion to recuse Judge Davies for

gender bias. Judge Collins was correct to conclude, in denying Stanley's recusal motion, that Stanley had not supported her allegations of gender bias on the part of Judge Davies. The only evidence that Stanely can point to in support of her bias allegation is Judge Davies' rulings on defendants' summary judgment motion, and general allegations about gender discrimination in sports and in the judicial system. General observations about gender discrimination do not support the disqualification motion, and Judge Davies' rulings in Stanley's case do not present the rare and extreme circumstances in which a judge may be recused on the basis of his rulings alone. *Liteky v. United States*, 510 U.S. 540, 556 (1994).

IV Re-taxing Costs

[18] Fed.R.Civ.P. 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Thus, Rule 54(d) creates a presumption in favor of awarding costs to prevailing parties, and it is incumbent upon the losing party to demonstrate why the costs should not be awarded. *National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471-72 (9th Cir. 1995).

At the conclusion of this litigation, the district court awarded costs to defendants as "prevailing parties" pursuant to Rule 54(d)(1). Stanley made a motion to re-tax costs, arguing: (1) that many of the costs were excessive; (2) that she in fact was a "prevailing party" in the litigation due to her success in procuring the TRO in Superior Court; (3) that forcing civil rights plaintiffs, like herself, to pay costs will have the chilling effect of dissuading other civil rights plaintiffs from bringing meritorious suits; (4) that she is unable to pay the costs without being rendered indigent; and (5) that Judge Davies exhibited gender-bias toward Stanley in the underlying proceedings.

[19] The district court determined that Stanley's arguments did not overcome the presumption in favor of taxing costs to the losing party. We review the district court's denial of a motion to re-tax costs for an abuse of discretion. *Schwarz v. Secretary of Health and*

Human Servs., 73 F.3d 895, 900 (9th Cir. 1995). We conclude that the district court abused its discretion, particularly based on the district court's failure to consider two factors: Stanley's indigency, and the chilling effect of imposing such high costs on future civil rights litigants.

[19] District courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases. See e.g., *Wrighten v. Metropolitan Hosps., Inc.*, 726 F.2d 1346, 1358 (9th Cir. 1984); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 486 (9th Cir. 1983). Stanley's argument that payment of the costs would render her indigent is compelling. Indigency is a factor that the district court may properly consider in deciding whether to award costs. See *National Org. for Women v. Bank of California*, 680 F.2d 1291, 1294 (9th Cir. 1982); *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994). The mere fact that Stanley had not obtained employment at the time of the filing of the cost bill is persuasive evidence of the possibility she would be rendered indigent should she be forced to pay $46,710.97 - the total amount that the district court awarded against her. The pertinent time, of course, is the time the costs were initially taxed; whatever may have occurred since that time is of no consequence.

[21] Furthermore, the imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. While we reject Stanley's claims, we also note that they raise important issues and that the answers were far from obvious. Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

We therefore hold that the district court abused its discretion in failing to re-tax costs awarded to defendants and remand tot he district court for reconsideration in light of these factors.

CONCLUSION

We affirm the district court's grant of summary judgment in favor of USC and Garrett and its denial of the motion for disqualification. However, we remand its denial of the motion to re-tax costs. We deny appellees' motion for sanctions. Each side shall bear its own costs on appeal.

PREGERSON, dissenting:

By focusing on the differences between Stanley's and Raveling's qualifications, the majority skips over the many ways in which gender discrimination insidiously affected the University's treatment of the women's basketball program and Stanley as its Head Coach. The University's half-hearted promotion of the women's basketball program, its intensive marketing of the men's basketball program, and the formidable obstacles Stanley faced as a woman athlete in a male-dominated profession contributed to this disparate treatment.

It is hard for me to square these realities with the majority's ruling denying Stanley relief without a trial.

Therefore, I dissent.